

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-221903

DATE: June 2, 1986

MATTER OF: IMPSA International, Inc.

DIGEST:

1. By regulation, a bidder's noncompliance with a bid guarantee requirement is properly waivable where the amount of the guarantee, although less than that called for in the solicitation, equals or exceeds the difference in stated prices between the bid and the next higher acceptable bid.
2. A bid is not mathematically unbalanced unless the bid is based on nominal prices for some work and enhanced prices for other work. Therefore, even though a bidder's item prices for the installation of equipment arguably may be understated, the bid is not mathematically unbalanced in the absence of any showing that the item prices for the equipment itself are overstated.
3. In order to prevail in its assertion that a bid is materially unbalanced and, therefore, nonresponsive, the protester must show that there is a reasonable doubt that acceptance of the bid will result in the lowest ultimate cost to the government. Where the agency is purchasing a complete system on a lump-sum, firm-fixed-price basis, and the solicitation does not involve pricing variables such as estimated quantities or option periods, the protester has failed to meet that burden.

IMPSA International, Inc. (IMPSA) protests the proposed award of a contract to Allis-Chalmers Hydro, Inc. (Allis-Chalmers) under invitation for bids (IFB) No. 6-SI-30-04130/DS-7658, issued by the Bureau of Reclamation, Department of the Interior. The procurement is for the supply and installation of turbines,

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governors, and generators for the Headgate Rock Hydroelectric Power Project, Arizona. IMPSA contends that Allis-Chalmers' apparent low bid should be rejected as nonresponsive because the firm's bid guarantee is insufficient in amount and because the bid itself is materially unbalanced. We deny the protest.

Background

The IFB required bidders to submit separate line item prices for equipment, installation, and spare parts. Items 1, 2, and 3 sought prices for, respectively, three hydraulic turbines, three mechanical-hydraulic governors, and three alternating-current generators. Items 1A, 2A, and 3A called for installation prices for those units. The IFB further required bidders to furnish a bid guarantee in an amount not less than 20 percent of the total combined price for items 1A, 2A, and 3A.^{1/} The submitted bids and the government estimate were as follows:

<u>Bidder</u>	<u>Combined Equipment</u>	<u>Combined Installation</u>	<u>Spare Parts</u>	<u>Bid Total</u>
Allis-Chalmers	\$9,094,865	\$1,195,545	\$66,457	\$10,356,867
IMPSA	7,718,800	2,779,620	70,660	10,569,080
Toshiba	8,896,000	2,640,000	162,000	11,698,000
Dominion	11,499,295	2,917,220	70,660	14,487,175
Osberg	8,560,000	5,896,000	439,000	14,895,000
Ingra	11,332,940	3,715,329	57,550	15,105,819
Nissho Iwai	12,710,000	4,115,000	179,000	17,004,000
Hitachi	12,729,000	4,281,200	192,000	17,202,200
Gov't Estimate	14,400,000	2,510,000	90,000	17,000,000

All bidders except Allis-Chalmers submitted bid guarantees in the form of bid bonds equal to 20 percent of their combined installation prices. Allis-Chalmers' guarantee was in the form of a cashier's check in the amount of \$228,000, which was \$11,109 less than the required 20 percent of its combined installation price ($\$1,195,545 \times .20 = \$239,109$). At bid opening, IMPSA orally protested to the contracting officer that Allis-Chalmers' bid should be rejected as nonresponsive because of the firm's deficient bid guarantee. IMPSA then formally protested to this Office.

^{1/} Because items 1A, 2A, and 3A involved construction, the IFB required the submission of Miller Act (40 U.S.C. §§ 270a-270f (1982)) performance and payment bonds at the time of award. See the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.102-1 (1984). Accordingly, a bid guarantee was required only for those items. FAR, 48 C.F.R. § 28.101-1(a).

Protest Position

IMPSA argues that Allis-Chalmers' bid should be rejected because the amount of the accompanying bid guarantee is less than that required by the terms of the IFB. Although IMPSA recognizes that a deficiency in a bid guarantee may be waived by the contracting officer when the amount of the guarantee is at least equal to the difference between the bid price and the next higher acceptable bid, the firm contends that this exception to the general rule is not applicable here. In this regard, IMPSA notes that evaluated bid prices, rather than stated bid prices, were determinative as to the low bid under the IFB, since, in accordance with the IFB's award criteria, the agency applied both foreign inspection service surcharges and Buy American Act evaluation differentials to equipment of non-domestic origin, and also utilized price discount factors in evaluating the warranted efficiency ratings of offered generators.^{2/} Thus, IMPSA argues that the \$212,213 difference between its stated bid price and Allis-Chalmers' is not controlling here with regard to the adequacy of Allis-Chalmers' bid guarantee, but rather the \$351,831 comparative difference between the firms' evaluated bid prices.^{3/}

IMPSA also contends that Allis-Chalmers' bid should be rejected as materially unbalanced because the firm's item prices for installation represent only nominal prices. IMPSA notes that Allis-Chalmers' prices for items 1A, 2A, and 3A are \$772,920, \$27,378, and \$395,247, respectively, whereas the prices submitted by the other bidders ranged from \$1,350,000 to \$3,794,000 (item 1A), \$167,000 to \$308,691 (item 2A), and \$820,000 to \$1,916,000 (item 3A). (The respective government estimate for those items was \$1,800,000, \$180,000, and \$530,000.) IMPSA urges that Allis-Chalmers deliberately

^{2/} Specifically, section M of the IFB provided that bids would be evaluated for comparison purposes by: (1) adding a foreign inspection service surcharge of \$35,000, \$9,000, and \$25,000, respectively, to the prices for items 1, 2, and 3 when the equipment offered was non-domestic in origin or was domestic in origin but containing foreign components; (2) adding a Buy American Act (41 U.S.C. §§ 10a-10d (1982)) evaluation differential of 6 percent to the prices for items 1, 2, and 3 and spare parts if foreign end products were offered; and (3) deducting from the item 3 prices \$195 per generator for each 1/100 of 1 percent by which the bidder's warranted efficiency rating for its offered generators exceeded 95.0 percent.

^{3/} According to IMPSA's calculations, the total evaluated prices for comparison purposes are \$10,490,167 for Allis-Chalmers' bid and \$10,841,998 for IMPSA's bid. The agency's calculations show the evaluated bid prices to be \$10,466,767 and \$10,775,698, respectively, a difference of \$308,931.

understated its installation prices and enhanced its equipment prices so that the firm, in view of its allegedly unstable financial condition, will not have to incur substantial costs in furnishing bonds to cover the installation items if awarded the contract.^{4/} IMPSA asserts that Allis-Chalmers' pricing structure, therefore, creates the risk that an award to the firm will not result in the lowest ultimate cost to the government should the firm's economic difficulties cause it to default on the contract prior to installation of the equipment.

Analysis

(1) Deficient Bid Guarantee

A bid guarantee assures that the bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute any post-award contractual documents and furnish performance and payment bonds. Kiewit Western Co., 65 Comp. Gen. 54 (1985), 85-2 CPD ¶ 497. This Office has consistently held that a bidder's failure to present an adequate bid guarantee at the time of bid opening renders the bid nonresponsive unless the bidder's noncompliance is properly waivable under the limited conditions set forth in the Federal Acquisition Regulation (FAR). Building Systems Contractors, Inc., B-219416, July 9, 1985, 85-2 CPD ¶ 36.

In this regard, FAR, 48 C.F.R. § 28.101-4(b) (1984), provides that noncompliance with a solicitation's bid guarantee requirement shall be waived (unless the contracting officer determines in writing that acceptance of the bid would be detrimental to the government's interest) when the amount of the bid guarantee submitted is less than the amount stipulated in the solicitation but is equal to or greater than the difference between the bid price and the next higher acceptable bid. See AVS Inc., B-218205, Mar. 14, 1985, 85-1 CPD ¶ 328. The rationale for this provision is that the government is protected from excess costs if award to the next bidder becomes necessary. Young Patrol Service Inc., B-210177, Feb. 3, 1983, 83-1 CPD ¶ 125.

In the present matter, we believe the agency is correct in its view that the deficiency in Allis-Chalmers' bid guarantee is properly waivable under FAR, § 28.101-4(b), supra, since the

^{4/} Because the penal sums of the Miller Act bonds to be furnished at the time of award are direct percentages of the combined item 1A, 2A, and 3A prices, (performance bond - 100 percent; payment bond - 50 percent) IMPSA contends that Allis-Chalmers' bid structure, by understating installation prices, will defeat the purpose of the bonds in not adequately protecting the interests of the government and third parties such as laborers, suppliers, and materialmen.

amount of the guarantee, \$228,000, exceeds the \$212,213 difference between the firm's bid and IMPSA's next higher acceptable bid. Although IMPSA argues that the difference between the evaluated bid prices, rather than the difference between the stated bid prices, is controlling in this instance, we find no legal support for the argument.

IMPSA misconstrues our decision in Consolidated Technologies, Inc., B-215723, Dec. 7, 1984, 84-2 CPD ¶ 639, in support of its position, since that case used the term "evaluated" price only to refer to the agency's basis for award, that is, the low total bid price for both base and option quantities, in deciding a question as to the adequacy of a bid guarantee. Consolidated does not stand for the proposition that the difference between stated bid prices is not determinative as to whether a bid guarantee deficient in amount nonetheless adequately protects the government's interest. As the agency points out, should an award to IMPSA become necessary, the firm would be awarded the contract at its stated bid price of \$10,569,080, and not at its evaluated bid price as calculated for comparison purposes. Since the amount of Allis-Chalmers' bid guarantee exceeds the difference between the stated bid prices, it is sufficient to fulfill the purpose of the guarantee by providing a penal sum which would be available to the government to offset any excess costs incurred in awarding the contract to IMPSA. See Trans-Alaska Mechanical Contractors, B-204737, Sept. 29, 1981, 81-2 CPD ¶ 268. We believe that IMPSA's position on this issue is clearly without merit.

(2) Unbalanced Bid

We have recognized two aspects to unbalanced bidding, both of which must exist before a bid is rejected. First, the bid must be found to be mathematically unbalanced, which involves an assessment as to whether each bid item carries its share of the total cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. Second, the bid must be materially unbalanced, that is, there must exist a reasonable doubt that an award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the government. Anchor Conveyors, Inc. et al., B-215624, et al., Oct. 23, 1984, 84-2 CPD ¶ 451.

Here, we cannot conclude that Allis-Chalmers' bid is mathematically unbalanced. Although the firm's installation prices admittedly are significantly lower than both the

government estimate^{5/} and the prices of its competitors, the firm asserts that it is able to realize reduced installation costs through the use of in-house labor. This appears to represent a legitimate reason for Allis-Chalmers' pricing structure, and even though IMPSA has submitted an affidavit from a former Allis-Chalmers employee in which the individual asserts that the installation cannot be performed at Allis-Chalmers' submitted prices for the work, we are not persuaded by this evidence so as to conclude that those prices are deliberately understated.

In any event, even assuming that Allis-Chalmers offered nominal prices for installation, IMPSA has failed to establish that the firm also offered enhanced prices for the remaining bid items, that is, the equipment itself. As already indicated, a bid is not mathematically unbalanced unless it is based on understated prices for some work and overstated prices for other work. See Microform, Inc.--Reconsideration, B-208117.2, Sept. 27, 1983, 83-2 CPD ¶ 380. Here, we note that Allis-Chalmers' price of \$6,368,221 for the turbines (item 1) is the fourth lowest price for those units, and is well below the government estimate of \$10,500,000. Similarly, its price of \$793,101 for governors (item 2) is the third lowest price for that item, and is also significantly lower than the government estimate of \$900,000. Furthermore, its price of \$1,933,543 for generators (item 3) is the lowest submitted price for those units, and is much lower than the government estimate of \$3,000,000. These facts do not support a finding that Allis-Chalmers' equipment prices are overstated. We conclude that the firm's bid, therefore, is not mathematically unbalanced.^{6/}

Moreover, even if we were to conclude otherwise, IMPSA has not shown that there exists a reasonable doubt that an award to Allis-Chalmers will result in the lowest ultimate cost to the government. Anchor Conveyors, Inc. et al., B-215624, et al., supra. There are no pricing variables involved in this IFB, such as estimated quantities or option periods, through which Allis-Chalmers, by enhancing its equipment prices, could recoup any losses occasioned by underbidding the installation items in an effort to reduce the bonding costs associated with those

^{5/} The agency noted this substantial difference and requested Allis-Chalmers to verify its installation prices. The firm responded that its bid "is correct in all areas."

^{6/} We also note that the percentage by which the government estimate for combined equipment prices represents the total estimated price of the contract (85 percent) is nearly the same percentage by which Allis-Chalmers' combined price for items 1, 2, and 3 represents its total bid price (88 percent).

items. Rather, the agency is purchasing a complete hydroelectric power system on a lump-sum, firm-fixed-price basis, and, therefore, we see no possibility that acceptance of Allis-Chalmers' bid will ultimately prove not to be in the government's best economic interest. Id. IMPSA's mere speculation that Allis-Chalmers' allegedly unstable financial condition will cause it to default on the contract prior to installing the equipment provides no legal basis to conclude that the firm's bid is materially unbalanced.

Moreover, IMPSA's assertion that Allis-Chalmers' pricing structure will result in the furnishing of inadequate Miller Act bonds (see note 4, supra) has no bearing upon the responsiveness of the firm's bid. Allis-Chalmers did not qualify its bid in any respect, that is, it was an unqualified promise to do the exact thing called for in the solicitation. Thus, the bid was responsive. See J.D. Bertolini Industries, Ltd., B-219791, Aug. 19, 1985, 85-2 CPD ¶ 193.

The protest is denied.

for, Seymour E. Fros
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